P.E.R.C. NO. 2006-103

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN TOWNSHIP,

Respondent,

-and- Docket No. CO-2006-239

FRANKLIN TOWNSHIP PBA
LOCAL NO. 188,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the request of Franklin Township PBA Local No. 188 for reconsideration of I.R. No. 2006-19 and a subsequent letter decision denying reconsideration of that decision. The PBA filed an unfair practice charge alleging that the Township of Franklin violated the New Jersey Employer-Employee Relations Act when it unilaterally changed the level of health insurance benefits, including the choice of physicians available to unit members. The designee denied the PBA's application concluding that the parties' contract allows the Township to change carriers and benefits "so long as in the aggregate substantially similar benefits are provided" and that the PBA had not demonstrated a likelihood of success on the merits of the charge. The PBA filed a new request for interim relief or reconsideration of the initial request based on new information revealed in the summary plan documents. The PBA alleged that the plan change was greater than imagined. The designee denied the request for reconsideration finding no extraordinary circumstances warranted reconsideration. The Commission disagrees and finds that the reduction in benefits and the increases in out-of-pocket expenditures are substantial and the ability to go to out-of-network providers has been eliminated. The Commission does not order the employer to restore the old plan at this time, but orders it to create a fund to reimburse employees for any expenses under the new medical plan that were covered by the prior medical plan. The Township also has the option of restoring the former plan. The order remains in effect pending the completion of the litigation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Carter, Van Rensselaer & Caldwell (William J. Caldwell, on the briefs)

For the Charging Party, Loccke & Correia, P.A., (Michael A. Bukosky, on the briefs)

DECISION

On June 7, 2006, Franklin Township PBA Local No. 188 moved for reconsideration by the full Commission of a Commission designee's interim relief decision, I.R. No. 2006-19, 32 NJPER 135 (¶62 2006), and subsequent letter decision denying reconsideration. The dispute concerns Franklin Township's decision to change health insurance plans.

The unfair practice charge was filed on March 22, 2006. It alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (5) and (7),[1/] when it unilaterally

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

changed the level of health insurance benefits, including the choice of physicians available to unit members. The charge alleges that the change was made without prior notice to, and negotiations with, the PBA and that the Township still refuses to negotiate with the PBA about the change and has not honored the PBA's requests for documents detailing the new health plan and the pre-existing plan.

The designee's initial decision was issued on April 27, 2006. He ordered the Township to provide to the PBA copies of the plan documents for the health insurance coverage that took effect on March 1, 2005 and for the coverage that succeeded it in March 2006.[2/] He denied the PBA's application for interim relief concerning the Township's alleged unilateral change in health insurance benefits. He found that, under the new plan, employees would no longer receive any coverage for using out-of-network providers. He nevertheless concluded that because the parties' contract allows the Township to change carriers and benefits or

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1/ (...continued)
rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules or regulations established by the Commission."

2/ A certification from a member of the Township Committee states that the Township had a right to change plans in February 2006. It is unclear when the change took place.

self-insure "so long as in the aggregate substantially similar benefits are provided," the PBA had not demonstrated a substantial likelihood that it will prevail on the merits of its charge.[3/]

On May 1, 2006, the PBA filed a new request for interim relief, or in the alternative requested reconsideration of the initial interim relief decision, based on the new information revealed in the summary plan documents provided by the Township to the PBA pursuant to the designee's initial order. The PBA argued that the reduction in health benefits was greater than imagined. It alleged these changes:

1. Out-of-network coverage eliminated
2. Basic coverage reduced from 100% to 80%
3. Individual deductible increased from zero to $1000
4. Family deductible increased from zero to $2000
5. Routine exam co-pay increased from $10 to $20
6. Well child exam co-pay increased from $10 to $20
7. Gynecological exam co-pay increased from $20 to $30
8. Mammograms co-pay increased from $20 to $30
9. Eye exam co-pay increased from $20 to $30
10. Physician visits co-pay increased from $10 to $20
11. Specialist visits co-pay increased from $20 to $25
12. Maternity visits co-pay increased from $20 to $30

3/ Article XVI is entitled Hospitalization Insurance. Section C provides: "The Township may, at its option, change insurance carriers or plans or self-insure so long as in the aggregate substantially similar benefits are provided."

13. Allergy visits co-pay increased from $20 to $30

14. X-ray co-pay increased from $20 to $30

15. Diagnostic lab co-pay increased from $20 to $30

16. Hospital care reduced from 100% to 80% coverage

17. Mental health services reduced from 100% to 80% coverage

18. Alcohol and drug services reduced from 100% to 80%

19. Skilled nursing care reduced from 100% to 80% coverage

20. Chiropractic care co-pay increased from $20 to $30

21. Prescription drug co-pay increased from $10/$20 to $15/$25

22. Routine hearing exam co-pay increased from $10 to $20

The Township opposed reconsideration. It argued that the designee was aware that the new plan did not provide out-of-network coverage, no extraordinary circumstances warranted reconsideration, and it had a contractual right to change plans.

On May 11, 2006, the Chairman referred the PBA's new request for interim relief and/or reconsideration to the Commission designee. The Chairman noted that the designee could then make findings based on the newly submitted plan documents and determine whether there was a basis for granting interim relief.

On May 30, 2006, the designee denied the PBA's requests. He stated that while all the differences between the current and former plans were not placed in the record during the initial

proceeding, the loss of out-of-network providers and increases in deductibles were reflected in a Medical Benefit Comparison submitted by the Township. In particular, the record indicated that annual deductibles for hospitalization increased from zero to $2000 annually per family. The designee concluded that, as that information was presented before, it did not constitute extraordinary circumstances warranting reconsideration. He noted that the PBA's submission asserted that the change in plans increased co-pays for physician visits, examinations and other listed diagnostic procedures by either $5 or $10 and reduced from 100% to 80% plan payments for hospital care and other continuing courses of treatment, subject to annual maximums; but he concluded that these additional changes did not warrant modifying his initial decision. He also declined to initiate a second interim relief proceeding, finding that his initial decision was the law of the case.

On June 5, 2006, the PBA moved for reconsideration by the full Commission. It argues that the designee should have reviewed the newly submitted plan documents. It argues that, based upon the evidence now supplied, extraordinary circumstances are present given the elimination of health benefits, and no reasonable analysis can conclude that the new plan is "substantially similar."

On June 14, 2006, the Township filed a response opposing reconsideration. It contends that the designee did not refuse to consider the matter on reconsideration, but properly concluded that the PBA would not likely succeed in showing that the Township unilaterally altered health benefits because the contract grants it sole discretion to change plans so long as "in the aggregate substantially similar benefits are provided." Finally, the Township argues that the PBA was put on notice that it needed to grieve this matter and that the time frame for filing a grievance has now lapsed. It asks us to sustain the designee's prior decision and dismiss the charge.

Only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration by the full Commission. City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004). Given the magnitude of the potential impact of the health insurance changes on unit members, this is such a case. Borough of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001).

To obtain interim relief, a charging party must first demonstrate that it has a substantial likelihood of success on the merits. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). The initial evidence submitted to the designee, combined with the evidence gathered from the plan documents submitted to the PBA pursuant to the designee's initial order, convinces us that the

PBA has a substantial likelihood of proving that the Township violated the Act by unilaterally decreasing the level of health benefits. The reduction in benefits and the increases in out-of-pocket expenditures are substantial and the ability to go to out-of-network providers has been eliminated. Under the old plan, the out-of-network maximum per family was $6000. The new plan has no out-of-network coverage and therefore no cap on an employee's liability for out-of-network expenses. In addition, besides the twenty-six $5 and $10 increases in co-pays, employees must now pay $1000 individual and $2000 family deductibles where none existed before. Inpatient mental health coverage, alcohol and drug services, and skilled nursing care are all reduced from 100% to 80% for participating providers. Certain benefits remain unchanged: network ambulance coverage, maximum in-network out-of-pocket expenses, maximum in-network lifetime expenses, and the need for primary care physician selection with referral requirements. We also note three areas of improvement: emergency care and urgent care co-pays decreased from $100 to $50 and durable medical equipment coverage changed from 50% with a $2500 cap to 80% with no cap. However, without specifically defining the limits of the phrase "substantially similar," our review of all the changes convinces us that the two benefit plans do not meet that test.

To obtain interim relief, a charging party must also demonstrate that irreparable harm will occur if the requested relief is not granted. Crowe. A unilateral change in health benefits during the negotiations or interest arbitration process can destabilize and irreparably harm that process. Closter. Even if the parties are not in negotiations, a unilateral change can nevertheless irreparably harm unit employees. Ibid. Here, unit employees face substantial new financial burdens as a result of the health plan change and may have to forego out-of-network services they would otherwise have sought. The PBA thus met its burden of proving irreparable harm.

Finally, in deciding whether to grant interim relief, we must consider the relative hardship to the parties and the public interest. Based on the Medical Benefit Comparison chart presented at the interim relief proceeding, the former medical plan would cost the employer an additional $40,000 per year. The employer has not identified additional harm to it from restoring the status quo. The financial liability individual employees face under the new plan is substantial. If they choose to go out of network, it is unlimited. The hardship that employees may suffer thus outweighs any hardship the employer would face pending the completion of litigation over this change in health benefits. Finally, the public interest underlying the Act disfavors unilateral imposition of such significant changes and no countervailing public interest in permitting unilateral action has been identified.

We will not order the employer to restore the old plan at this time. We will simply issue an order to create a fund that will protect employees from any possible harm. We note that for the very reasons we are convinced the plans are not "substantially similar," the employer may decide that its potential liability in setting up a fund is too great and that it would be more fiscally prudent to restore the former plan.

ORDER

Reconsideration is granted. The Township of Franklin is ordered to restore the status quo by establishing a fund to reimburse unit employees for any expenses under the medical plan established in March 2006 that were covered by the medical plan in existence before that date. The Township also has the option of restoring the former plan. This order will remain in effect until a final Commission order, or if the matter is deferred to arbitration, a final arbitration award.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Katz was not present.

ISSUED: June 29, 2006

Trenton, New Jersey